APPENDIX A

Opinion of the Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19164

TEXAS AND NEW ORLEANS RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD COMPANY AND THE TEXAS MEXICAN RAILWAY COMPANY,

Appellants,

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL,

Appellees.

Appeal from the United States District Court for the Southern District of Texas

(July 6, 1962)

Before RIVES, CAMERON and GEWIN, Circuit Judges.

RIVES, Circuit Judge: This action was brought on July 7, 1961 by the Texas and New Orleans, the Missouri Pacific, and the Texas Mexican Railway Companies, under 28 U.S.C. §1331, to enjoin a strike by the Brotherhood of Railway Trainmen set for July 10, 1961 in Corpus Christi, Texas. On the same day the action was brought, the court below issued a temporary restraining order and set the hearing of the

motion for preliminary injunction for July 12. In an opinion dated July 21, the court concluded that the Norris-LaGuardia Act precluded injunctive relief and on July 24 denied the request for a preliminary injunction. On the same day, however, the court entered an injunction pending appeal.

The findings of fact of the district court and its conclusions of law are embodied in an able opinion reported at 197 F. Supp. 348 (S.D. Tex., 1961). The facts will be briefly summarized here. Prior to November 1960 the only rail access to Corpus Christi from the north was by the bascule bridge built in 1926 for the then current demands. Since that time the population of the area has increased some eight times and the bridge became a bottleneck to rail,* auto, and maritime traffic. In 1950 the first plans were made for a new high-level vehicular bridge and for a new railway bridge several miles further up the shipping channel. By 1955 contracts were completed with the city for the new railway bridge, and the bridge was completed in the Fall of 1959. Because of the change in location, considerable changes in operation had to be made by the railroads. These changes were incorporated in outline in a Primary Agreement between the various parties involved — the three railroad appellants, the City of Corpus Christi, the County of Nueces, and the Nueces County Navigation District No. 1. Supplemental agreements were then made in accordance with the Primary Agreement between certain of the parties — a Joint Yard Agreement between the Texas and New Orleans and the Texas Mexican and a Joint Track Agreement between the railroads and the Navigation District. The changes more specifically involved in this appeal were: (1) plans of the Texas and New Orleans and the Texas Mexican, which had hitherto conducted separate yard op-

* Word "rail" withdrawn on rehearing (Petitioners' note).

erations, to construct a joint yard under one management with joint switching service by joint crews; (2) new arrangements between the railroads and the Corpus Christi Terminal Association for servicing the port and the industries connected thereto — in particular the industries which the Texas and New Orleans had served up to that time in the vicinity of the old bascule bridge; and (3) various joint car-interchange operations among the railroads through the use of the Corpus Christi Terminal Association.

Since these agreements involved changes in the working conditions of the railroad employees, negotiations were begun with the unions in May of 1959. Agreements consistent with the Primary Agreement were eventually reached with the various nonoperating unions, the engineers and the firemen. The Railway Trainmen, however, held out. On May 4 and 5th, 1960, the railroads served Section 6 notices on the Trainmen in accordance with the Railway Labor Act, section 6, 45 U.S.C. §156, giving 30 days' notice of proposed changes in working conditions.[1] On June 15, 1960, the disputes were referred to the National Mediation Board. Under section 156 (footnote 1, supra) the proposed changes

[1] "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." 45 U.S.C. §156.

in working conditions could not be instituted until termination of mediation.

Several months later, on October 13, 1960, an application was filed with the Interstate Commerce Commission asking for permission, pursuant to 49 U.S.C. §1 (18),[2] to abandon certain old tracks and requesting approval pursuant to 45 U.S.C. §5 (2) of the new methods of operation incorporated in the Primary and Supplemental Agreements. On October 27, the Brotherhood of Railroad Trainmen filed a protest on the ground that employees would be adversely affected. On November 16 the Interstate Commerce Commission issued a report, order of approval, and necessary certificates approving the proposed changes. The union protest was denied except for insertion of the normal labor protective provisions. Two days later the bascule bridge rails were cut. With the bridge cut and the proposed changes approved, the railroads put the primary Agreement and supplemental agreements into effect in spite of the fact that

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[2] "§1, par. (18). *Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

they were still in mediation with the Brotherhood of Railroad Trainmen over the changes in working conditions.

On November 20, 1960, the Brotherhood of Railroad Trainmen filed a suit in the federal court asking that the railroads be enjoined from putting certain of the operational changes into effect. A temporary restraining order was denied and after various preliminary moves the Brotherhood of Railroad Trainmen asked for and was granted a voluntary dismissal on June 26, 1961. Meanwhile, in May of 1961, the mediation proceedings were terminated since no agreement could be reached and the union refused arbitration. On July 6, notice of the strike giving rise to this suit was served on the railroads.

This suit presents a three-way conflict between major pieces of federal legislation; surprisingly, it appears to be a case of first impression, although all three statutes have been on the books for some 30 years or more.* Stated simply, the railroads claim that the union is threatening a strike to force the railroads to violate valid orders of the ICC; that all other federal or state laws are pre-empted by the "exclusive and plenary" authority of the ICC to approve the work changes involved; that the strike is therefore illegal, unprotected by any other legislation, and should be enjoined. The unions reply, (1) that the strike concerns a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 U.S.C. § 101 which withdraws the courts' jurisdiction to provide injunctive relief, and (2) that no injunctive relief is warranted where the railroads instituted the changes in working conditions in violation of the Railway Labor Act, 45 U.S.C. § 152 Fifth, 156, while the parties were in mediation. Also involved are time claims

* Words "30" and "or more" withdrawn on rehearing. (Petitioners' note).

totalling more than $500,000 for wages lost as a result of the changes.

The Norris-LaGuardia Act, 29 U.S.C. § 101 provides:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

(See also 29 U.S.C. § 104.) If this section is applicable, the railroads do not appear to contend that they have satisfied the conditions of the Act to obtain an injunction under it. They must show therefore that either (1) the section, by its own terms, is not applicable to the present dispute, (2) an express grant of jurisdiction is given in other legislation, or (3) the section is pre-empted by other legislation.

Looking first to the terms of the statute, there would appear little question that the threatened strike is over a "labor dispute." Under 29 U.S.C. § 113 (c), a "'labor dispute' includes any controversy concerning terms or conditions of employment." The railroads themselves recognized that the dispute involved such a controversy when they filed notices on the appellees in May of 1960, in accord with section 6 of the Railway Labor Act, of proposed changes in the appellee's working conditions. Some cases have spoken in terms of "no labor dispute" when in fact they were holding that the Act was not applicable for some other reason. *See, e.g., Baltimore & O.R. Co. v. Chicago River & Indiana R. Co.*, 7 Cir., 1948, 170 F. 2d 654. Others have held that there is no labor dispute where railroad unions have threatened a strike before the changes in working conditions were put into effect or before any of the steps contemplated by the

settlement machinery of the Railway Labor Act had been taken by the parties. *See Brotherhood of Railroad Trainmen v. New York Cent. R. Co.*, 6 Cir., 1957, 246 F. 2d 114. Here, the proposed changes have already been put into effect and the question of whether the Norris-LaGuardia Act is applicable will be taken up later. As a factual matter the present dispute has every attribute of a "labor dispute."

The Norris LaGuardia Act was passed with the very clear congressional intent to end injunctive interference in labor relations. To make perfectly plain that this intent was not to be frustrated by judicial construction, as had been done so often in the past, the Act went not just to the substantive law to be applied in a "labor dispute" but to the court's jurisdiction: "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction . . . ." Thus the appellants must not deal merely with the substantive law to be applied to a "labor dispute," but they must find jurisdiction for a federal court to consider the problem. Clearly, no help is found in 28 U.S.C. §1331, the general federal-question jurisdictional section under which this action was brought. Nor is the primary section upon which the appellants rely in this action, 49 U.S.C. §5 (11), *on its face* of any greater help. This section provides:

> "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized

> under the provisions of this section shall be and they are hereby relieved from the operation of the anti-trust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction . . . ."

This section relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief. Thus section 5(11) does not, by express terms, grant the jurisdiction which Norris-LaGuardia withdrew.

One broad category of rather narrow exceptions has been made to the strictures of Norris-LaGuardia where, in the words of the Court in *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, 1957, 353 U.S. 30, 42, there is "the need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation." For where Norris-LaGuardia conflicted with the Railway Labor Act, the Court argued, the abuses which Norris-LaGuardia sought to remedy were no longer present since detailed congressional provisions had been made for dealing with railway "labor disputes" under the Railway Labor Act. The Court stated:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute

> and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."

353 U.S. at p. 40. In accordance with such reasoning, the Court has allowed injunctive and equitable relief, (1) when railway unions attempt to strike over "minor disputes," *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, *supra*; (2) when an employer refuses to bargain with a certified union, *Virginian Ry. v. System Federation No. 40*, 1937, 300 U.S. 515; (3) when a union refuses to fairly represent members of the Negro race, *Steele v. Louisville & Nashville R. Co.*, 1944, 323 U.S. 192; and (4) to compel arbitration when the parties have agreed to settle disputes arising out of a collective bargaining contract by arbitration, *Textile Workers v. Lincoln Mills*, 1957, 353 U.S. 448.

The appellants argue that this category of exceptions is applicable in the present case. They contend that section 5 (2) (f) of the Interstate Commerce Act, 49 U.S.C. § 5 (2) (f),[3] is also part of the national pattern of labor legislation

[3] "(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. §5(2)(f).

and that an injunction is necessary to carry out its provisions. Section 5 (2) (f) makes it the Commission's duty to require as a condition of approval of a § 5 (2) transaction that "a fair and equitable arrangement to protect the interests of the railroad employees affected" be included. The railroads argue that this is the only protection to which the employees are entitled, that they obtained such protection in this case, and that the railroads are therefore entitled to an injunction "to preserve the obvious intention" of § 5 (2) (f). This is a difficult road to travel.

Admittedly, § 5 (2) (f) prescribes the maximum protection to which the employees are entitled from the Interstate Commerce Commission. But is the union prohibited from gaining further rights in the transaction through the use of its own economic power — the strike? The appellants are unable to come up with any express legislative history to that effect; rather, they argue that Congress "assumed" that railway labor would be unable to hold out for an understanding more in their interest. It is always dangerous to argue that Congress "assumed" anything, but there are also other considerations which make it unlikely that Congress intended § 5 (2) (f) to have such far-reaching effects. In the first place, as the Commission itself pointed out in *Chicago, St. Paul, M. & O. RR Lease*, 295 ICC 696, 701, "this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything." But more important, labor relations is a highly complex subject. The exceptions the courts have made to Norris-LaGuardia "to accommodate" other labor legislation have only been made where Congress, through such detailed legislation as the Railway Labor Act and Taft Hartley Act, has "channeled these economic forces [capital and labor] . . . into special processes intended to compromise them"

(353 U.S. at 41), and where these processes would be frustrated without injunctive aid. Do the processes of section 5 (2) (f) and the imposition upon the union of a minimum fair and equitable arrangement chosen without its consultation by the carrier provide a complete and proper channel for the compromise of the forces of capital and labor? Can they be compared with the machinery of the Railway Labor Act or the Labor Management Relations Act? We do not think so. The types of special processes which the courts have enforced with injunctive relief have all involved extensive negotiations and bargaining between the parties, or agreements which result from such bargaining; never processes which allow management to unilaterally choose a change in working conditions and give the union a small voice of protest if the change is unfair or inequitable. For the balancing and compromising of labor and capital ranges far beyond the minimum which is fair and equitable; it extends to such trivial sources of friction between the parties as led the Court to say in *Steelworkers* v. *American Mfg. Co.*, 1960, 363 U.S. 564, 568, in granting enforcement to an arbitration clause:

> "The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

We therefore conclude: (1) that Congress did not intend section 5 (2) (f) to delimit the maximum protection the employees could obtain, and (2) that the strictures of Norris-LaGuardia need not be raised to accommodate the obvious intention of section 5 (2) (f).

This leaves the basic issue of the Interstate Commerce Commission's power under section 5 of the Interstate Com-

merce Act, and the meaning to be given to the language of section 5(1) that the Commission's authority is "exclusive and plenary." This pits the transportation policy of section 5, rather than the labor policy of section 5 (2) (f), against that of Norris-LaGuardia. If it should be determined that the Commission's authority under section 5 is being frustrated by application of Norris-LaGuardia to the present suit, we would have to conclude that Norris-LaGuardia was pre-empted by section 5 (11), even thought section 5 is not labor legislation. The problem is by no means easy.

The appellants argue: (1) that it was the clear congressional intention in section 5, and particularly subsection 5 (2), to foster the voluntary consolidation and integration of the national railroads, see *St. Joe Paper Co. v. Atlantic Coast Line R. Co.*, 1954, 347 U. S. 298; (2) that the only standards for such consolidations are set down in section 5 (2), see *McLean Trucking Co. v. United States*, 1944, 321 U. S. 67; (3) that any outside interference, whether it be by legal or private action, is pre-empted, see *Texas v. United States*, 1934, 292 U. S. 522. Thus, once a transaction is approved by the ICC, the appellants conclude that the only valid restraint is the railroad's own decision not to go through with the "voluntary" transaction. Whether the cases support this view is questionable.

The essence of the appellants' objective is to unilaterally set certain provisions in a new labor contract in accord with the proposed changes in the Primary Agreement, and to be relieved of an existing labor contract without having to go through the machinery of the Railway Labor Act (the reformation procedure for railway labor contracts) or being subjected to one of the penalties for breach — a strike. They have attempted to accomplish this objective by including such detail in the Primary and supplementary agreements

submitted to the ICC for approval as to determine the major provisions of a new labor contract, although at no time were the unions brought into the negotiation of these agreements. The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5 (2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

Section 5 (2) involves "transactions" to achieve certain stipulated ends; these transactions require the approval of the Commission. There is no definition given of what goes into a "transaction," but it appears to be a catchall descriptive term referring to the many different elements involved in mergers, leasing agreements, pooling arrangements, or joint operations. As often described in other contexts, it is a word "of flexible meaning" and "may comprehend a series of many occurrences, depending not so much upon the immediacy of their connection as upon their logical relationship." See *Cantrell v. City of Caruthersville*, Mo., 1949, 221 S.W. 2d 471, 474; *Kaumagraph Co. v. General Trade Mark Corp.*, D.C.N.Y., 1935, 12 F. Supp. 230. Apparently the Commission feels that one of the occurrences or elements involved may be contracts and agreements between interested parties to the transaction, since its regulations require that there be attached to any application for approval of a 5 (2) transaction "a copy of any contract or other written instrument entered into or proposed to be entered into pertaining to the transaction covered by the application." 49 C.F.R. § 52.3 (b) (7). It would further appear from sections 5 (2) (c) and (f) that the representa-

tives of the carrier employees are included among the interested parties to a transaction and that a new labor contract may be one of the ingredients of a transaction. Now, are we to read into the authority of the ICC to "approve" a transaction, the right of the carrier to unilaterally create one of the contracts which may be necessary to the completion of that transaction and thereupon bind a third party to it? Clearly, that does not follow as a matter of course from the normal meaning of the terms used in section 5 (2) (a).

Nor has the ICC, in its interpretation of section 5 (2), found any such hidden authority. It looks upon its duties as purely permissive, approving with appropriate conditions contracts, agreements, and consolidations which are negotiated by the parties under the normally applicable law governing such transactions in other fields. As the Commission has often held, it has no power to compel a carrier to undertake a section 5 (2) transaction. See, *e.g.*, *Baltimore & O. R. Co. Operation*, 261 ICC 535, 544; *Gulf M. & O. R. Co. Purchase*, 267 ICC 265, 269-70; *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696. Further, it has been unwilling to take upon itself questions of either the interpretation or enforceability of contracts submitted with respect to a transaction. Upon occasion, parties, who have come before the Commission with executory contracts to take effect upon approval by the Commission, wish to withdraw from the proceeding. As the Commission said in refusing to dismiss the proceeding in *McGary Transportation Co. — —Purchase (Portion) — Albert J. Demelle*, 50 MCC 608, 611 (1948):

> "As to vendor's desire to withdraw from the transaction, we have repeatedly found that authority granted under former section 213 and present section 5 is permissive only, and may, or may not, be exercised by the parties, and that all matters involving the interpretation and enforcement of the terms of contracts

must be left for settlement between the parties themselves or by the courts."

See also, *Watson Bros. Transp. Co.* v. *Jaffa*, 8 Cir., 1944, 143 F. 2d 340; *O. C. Wiley & Sons* v. *United States*, W.D.Va., 1949, 85 F. Supp. 542; *Marion Trucking Co. — Purchase — Harwood Trucking Co.*, 50 MCC 613, 632 (1948); *The Service Transport Co. — Purchase (Portion) — F. E. Kerr Co.*, 59 MCC 481.[4] Even where a carrier has transferred the same rights and equipment to two different parties, the Commission has held that it must treat each application on its merits and let the two vendees litigate their conflict in the courts. *Yellow Coach Corp. — Purchase — O. B. Darnell*, 59 MCC 185, 193-94. From these cases, we believe the Commission is of the opinion that the carriers must rely upon applicable contract and corporate law to carry their section 5 (2) transaction into effect, and may not rely upon the Commission's "approval" to coerce a recalcitrant party into line. Further, we feel that it would be inconsistent with this construction of the statute to hold that, while the carriers must look to local law to enforce the transaction, unions and other noncarrier parties are bound without their consent by the Commission's permissive approval.

The appellants also argue that when the Commission conditions its approval upon the inclusion of employee protective provisions under section 5 (2) (f), these conditions bind the employees upon the carriers' decision to go through with the transaction. As already noted, however, the Commission has held that it has authority to impose conditions only on the carrier. *Chicago, Saint Paul, M. & O. R. Co. Lease*, 295 ICC 696, 701. Further, we can see little purpose

[4] "Authority granted under section 5 is permissive only, and, in the event of a dispute, the contractual rights and obligations of the parties are for determination by the courts rather than by us." 59 MCC at 484.

to the last sentence of section 5 (2) (f) if the most that the unions can bargain for is what they can obtain by right from the Commission. The sentence provides:

> "Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

To permit the railway unions to enter into an agreement, yet deny them the full use of their bargaining power, i.e., the strike, would make the provision meaningless. On the other hand, by giving it full latitude, we achieve a result consistent with our basic view of section 5 (2): that to carry an approved transaction into effect, the parties must rely upon agreements voluntarily entered into and enforced under local law. In accord with this reasoning, the Commission has refused to hear employee complaints when a protective agreement has been entered into by the parties, enforceable under the applicable local law. *DeCamp Bus Lines — Purchase — Atlantic Transport Co.*, 65 MCC 452, 456.

The appellants have a secondary claim to the effect that one of the issues preventing settlement of the dispute concerns the time claims totalling more than $500,000, representing wages lost as the result of changes in working conditions instituted while the parties were in mediation, in violation of the Railway Labor Act, 45 U.S.C. §§ 152 Fifth, 156. These claims are apparently calculated by taking the difference between actual wages under the changed working conditions and wages as they would have been under the old agreement.* The appellants claim that these claims

* These sentences were withdrawn on rehearing. (Petitioners' note).

are "minor disputes" to be adjusted in accord with the Railway Labor Act, 45 U.S.C. § 153, and that under *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R. Co.*, 1957, 353 U. S. 30, injunctive relief is available to insure compliance with the procedures of the Act. It would appear from *Order of Telegraphers v. Railway Express Agency*, 1944, 321 U. S. 342, that when working conditions are changed in violation of section 6 of the Railway Labor Act, then the old agreement is considered to remain in effect and the wage claims under the old agreement are minor disputes. See also *Western Air Lines v. Flight Engineers Internat'l Ass'n*, S.D. Cal., 1961, 194 F. Supp. 908, 911.

This issue was not raised in the Complaint, however. The only references to it in the record are two or three pages of testimony describing generally the union demand during the negotiations over the proposed changes that these claims be paid. The claims themselves were not described in any detail, none of them were proved or the exact amount established. The court below did not treat them at all in its main opinion, but, in response to a request for supplemental findings of fact and conclusions of law, found that "when properly processed by the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act, these time claims will be properly referable by the parties involved to the National Railroad Adjustment Board for decision." No relief with respect to the claims was granted.

Because of the failure of the appellants to raise the issue in its Complaint or to put the appellees on notice during the trial that this specific relief would be asked, and because of the insufficiency of the evidence on the issue, we believe the relief was properly denied. This conclusion, however, is in no way prejudicial to the right of the appellants to raise the issue again in a court of proper jurisdiction, should they so desire.

The judgment of the district court is due for affirmance.

Nonetheless a caveat seems to be called for by the peculiar facts of this case. Since the bascule bridge has been cut, some changes must go into effect. The question is not, therefore, to change or not to change, but what change. Under these circumstances the carriers might be in the position of having either to accede to union demands involving changes which the Commission would find contrary to the public interest, or helplessly to sit out a crippling strike. Since the Commission can obtain equitable relief to enforce the transaction as approved, and accepted by the carriers, or even prosecute the violation, the carriers could be caught in an insoluble dilemma — although it might be argued that it was one of their own creation. Under certain circumstances, when carriers have been faced with contract demands which would be contrary to the public interest in the effectuation of a section 5 (2) transaction, the courts have held that the carrier may be relieved of these demands by the Commission. In *Schwabacher* v. *United States*, 1948, 334 U. S. 182, in a section 5 (2) merger, the Commission had referred a dissenting group of preferred stockholders to the state courts for the adjudication of their liquidation rights on merger. This group maintained that, under state law, they were entitled to all their accumulated preferred dividends in addition to the equitable redemption value of their stock. The Commission held that the amount offered these stockholders in the plan of merger was "just and reasonable," but since the amount involved would have little effect upon the resulting financial condition of the merged carrier, the stockholders could pursue their contractual rights in the state court. The Supreme Court remanded the case to the Commission, holding that where the carriers had made a "just and reasonable" offer to the dissenting stockholders, the carriers had the right to be relieved of any additional contractual liability under state law, obligations

which would presumably be contrary to the public interest. The Court relied upon the Commission's plenary authority under section 5 (11) and its authority to control the carrier's financial structure under section 20a.

While *Schwabacher* differs considerably from the present situation, both because of the inability of a minority group of preferred stockholders to oppose a merger and because of the unusual control of the Commission over a carrier's financial structure, it may have some bearing on this case. It may indicate that after due notice and hearing, the Commission would have jurisdiction to determine whether the union demands are contrary to the public interest in the effectuation of the section 5 (2) transaction. There is no such finding by the Commission in this record; nor can we assume there will be one. Unlike the question of buying out dissenting stockholders where there is only one "just and reasonable" price representing the economic valuation of their stock, there may be many "fair and equitable" arrangements for the appellee unions. There may be many possible combinations of new working conditions that would conform to the general objectives of the carriers in this transaction. The unions may hold out for any possible "fair and equitable" arrangement. If then the differences between the unions and the carriers prove irreconcilable, and the question is suitably presented to the Commission, it may determine its jurisdiction vel non to find whether certain of the union demands are contrary to the public interest in the effectuation of the transaction. *Ct. Gulf M. & O. R. Co. — Abandonment*, 282 ICC 311, 332-35. The carriers may have grounds for relief to permit such jurisdiction to be determined and exercised and thereafter to prevent the enforcement of particular demands found to be contrary to the public interest. This matter, both on the law and the facts, if litigable at all, is within the primary jurisdiction of

the Interstate Commerce Commission. While we suggest it as a possible avenue of procedure, if the need arises, we have no intention of instructing or affecting the Commission's decision in any way. This bridge may not be reached and should not be crossed until we come to it.

The judgment is

AFFIRMED.

CAMERON, Circuit Judge: I concur in the result.

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Appellees.

Appeal from the United States District Court for the Southern District of Texas

(August 17, 1962)

ON PETITION FOR REHEARING

Before RIVES, CAMERON and GEWIN, Circuit Judges.

PER CURIAM: In our opinion we stated that, "The findings of fact of the district court and its conclusions of law are embodied in an able opinion reported at 197 F. Supp. 348 (S.D. Tex. 1961)." Perhaps we should have made express mention of the supplemental findings of fact, which we did not overlook, viz:

> "On motion of plaintiffs I make the following findings of fact and conclusions of law, supplementing those contained in my Memorandum Opinion of July 21, 1961.

"FINDINGS OF FACT

"(1) In addition to the contracts referred to in the Memorandum Opinion of July 21, 1961, in this case, there was also an amended Corpus Christi Terminal Association Agreement, a copy of which was attached to the application filed by the three plaintiffs and Nueces County Navigation District with the Interstate Commerce Commission.

"(2) Beginning at 12:01 A.M., November 18, 1960, when the track leading across the bascule bridge into Corpus Christi was cut by the City of Corpus Christi, the plaintiffs started railroad operations in accordance with the four contracts, copies of which were attached to the application with the Interstate Commerce Commission and in accordance with the authority granted by said Commission in its order of November 16, 1960. Operations in such manner have continued to date.

"(3) The strike which the Brotherhood of Railroad Trainmen called against the three plaintiffs to start on Monday, July 10, 1961, was for the purpose of compelling said plaintiffs to make agreements providing for operations different from those authorized by the said Commission in its Order of November 16, 1960, and particularly in the following respects:

"(a) To require Texas and New Orleans Railroad Company and The Texas Mexican Railway Company to conduct separate operations, including separate Corpus Christi Terminal Association (C.C.T.A.) operations, in the Corpus Christi Terminal instead of joint operations.

"(b) To require Texas and New Orleans Railroad Company, as distinguished from C.C.T.A. to switch its former yards and industries in the Hughes Street-Tancahua Industrial Area. In order to reach said tracks, yards and industries as an individual railroad it would be necessary for Texas and New Orleans Railroad Company to operate over trackage owned by Missouri Pacific Railroad Company. Texas and

New Orleans Railroad Company is permitted to use said trackage for reaching the area in question when operating the C.C.T.A., but is not permitted to use Missouri Pacific track for the purpose of reaching the area in question as an individual railroad.

"(c) To require payment by the three plaintiffs to their respective employees of various time claims which have been filed by said employees represented by the Brotherhood of Railroad Trainmen against the three plaintiffs because of the changes in operations which occurred on, and have continued since, November 18, 1960, at Corpus Christi, Texas. At the time of the trial said time claims against the three plaintiffs were in excess of $500,000.00. When properly processed by the Brotherhood of Railroad Trainmen under the provisions of the Railway Labor Act, these time claims will be properly referrable by the parties involved to the National Railroad Adjustment Board for decision.

"In addition, defendants' counsel has requested the following findings of fact, which I make:

"Mediation Cases Nos. A-6265, 6266 and 6267 referred to in the stipulation which was made a part of the record in this case, were pending at the time plaintiffs filed the application with the Interstate Commerce Commission in October 1960, for approval of the changes in operation at Corpus Christi, Texas. Said cases were still pending at the time the Commission issued its Order on November 16, 1960, in response to said application and when the plaintiffs changed their methods and manner of operation on November 18, 1960."

The time claims referred to in paragraph (c) of the supplemental findings are the ones to which we had inaccurately referred in our opinion, as follows: "The appellants have a secondary claim to the effect that one of the issues preventing settlement of the dispute concerns the time claims total-

ling more than $500,000, represently wages lost as the result of changes in working conditions instituted while the parties were in mediation, in violation of the Railway Labor Act, 45 U.S.C. §§ 152 Fifth, 156. These claims are apparently calculated by taking the difference between actual wages under the changed working conditions and wages as they would have been under the old agreement." The two sentences of our opinion just quoted are withdrawn.

In our opinion we said: "Prior to November 1960 the only rail access to Corpus Christi from the north was by the bascule bridge built in 1926 for the then current demands. Since that time the population of the area has increased some eight times and the bridge became a bottleneck to rail, auto, and marine traffic." The word "rail" is stricken from the last sentence just quoted.

In our opinion we said: "This suit presents a three-way conflict between major pieces of federal legislation; surprisingly, it appears to be a case of first impression, although all three statutes have been on the books for some 30 years or more." The figure "30" and the final words "or more" are stricken.

The foregoing changes are made in order to avoid any inaccuracy. None of these changes permits a change in the result.

Appellees, on their part, urge that " . . . this Court's mandate should dissolve the temporary restraining order pending the appeal previously issued by the District Court." By its terms, the restraining order or injunction pending appeal issued by the district court was to continue in force "during the pendency of the appeal of this case and until a final order has been entered herein on appeal." We agree with the construction implicit in appellees' request just quoted, that is that when this Court's mandate issues, the

appeal will no longer be pending and a final order on appeal will have been entered. Hence, by its terms, the restraining order or injunction pending appeal will terminate upon the issuance of this Court's mandate. It is nonetheless true that the mandate may be stayed under the terms of Fifth Circuit Court Rule 32, or to enable the appellants to obtain a writ of certiorari from the Supreme Court. See 28 U.S.C.A. §2101 (f).

The petition for rehearing is

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19164

D. C. DOCKET NO. 13,736 CIVIL

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY AND
THE TEXAS MEXICAN RAILWAY COMPANY,
Appellants,

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before RIVES, CAMERON and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Texas and New Orleans Railroad Company, Missouri Pacific Railroad Company and The Texas Mexican Railway Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Cameron, Circuit Judge, Concurs in the Result."

Issued: July 6, 1962

ORDER DENYING REHEARING

Extract from the Minutes of August 17, 1962

TEXAS AND NEW ORLEANS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY AND
THE TEXAS MEXICAN RAILWAY COMPANY,

No. 19164

VERSUS

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX B

Opinion of the District Court of the Southern District of Texas, Houston Division

JULY 21, 1961

BEFORE INGRAHAM, DISTRICT JUDGE

Plaintiffs, Texas and New Orleans Railroad Company (hereinafter "T&NO", Missouri Pacific Railroad Company (hereinafter ("MoPAC"), and The Texas Mexican Railway Company (hereinafter ("TEX-MEX"), seek to enjoin a strike called by the Brotherhood of Railroad Trainmen (hereinafter ("BofRT") a labor organization representing some of plaintiffs' employees. A brief statement of pertinent facts follows to lead context to the threatened strike. These facts were gleaned from the pleadings and hearing of July 12-13, 1961.

When the bascule bridge was removed from the entrance to the Port of Corpus Christi, Texas, it became necessary to reroute and rearrange railroad service to the city and Port of Corpus Christi. Anticipating this necessity, the three railroads made these contracts:

> (1) Primary Agreement between City of Corpus Christi, County of Nueces, Texas, Nueces County Navigation District No. 1, MoPAC, TEX-MEX, and T&NO It set forth rail service rearrangements (track abandonment, new track construction, joint yard, track rights) and methods of operation. This agreement contemplated other contracts and specified that as each was finalized a copy be filed with the Interstate Commerce Commission (hereinafter "Commission").

(2) Joint Yard Agreement between T&NO and TEX-MEX. It called for joint yard and rendition of joint switching service by joint TEX-MEX and T&NO crews. Operating costs of crews were to be prorated between the two railroads on agreed formula.

(3) Corpus Christi Joint Track Agreement. Contract between railroads and Navigation District granted trackage rights and allocated expenses.

After Primary Agreement was placed in final form and others in tentative form, application was filed with Commission under sections of the Interstate Commerce Act (hereinafter "Act"), especially 49 U.S.C.A. Sec. 5(2), for approval of the contracts and authority to effectuate them. The Railway Labor Executives' Association, which includes BofRT, filed a protest with Commission, claiming plaintiffs' applications would affect adversely plaintiffs' employees. On November 16, 1960, Commission approved all transactions involved in the applications. Commission referred specifically to each of the agreements described above. Pursuant to Commission's order, the Joint Yard Agreement between T&NO and TEX-MEX (finalized and executed on November 17, 1960) was forwarded to Commission for filing on November 25, 1960. By letter of December 8, 1960, Commission acknowledged receipt and filing of Joint Yard Agreement.

The Commission's report of November 16 (sheet 12) provided:

"No facts have been disclosed indicating that Railroad employees will be adversely affected by any of the proposals involved herein. However, all of the authorizations herein will be made subject to the same conditions for the protection of employees adversely affected by any part of the transactions involved in these proceedings as prescribed in Oklahoma Ry. Co. Trustees Abandonment, etc. . . ."

Neither the Railway Labor Executives' Association nor BofRT sought rehearing of the November 16 decision by the full Commission or tried to have the order set aside by three-judge court. The order thereby became final.

Before filing these applications with the Commission, these railroads negotiated with their employees' union trying to make agreements consonant with new operations contemplated in the agreements finally approved by the Commission. These negotiations continued after the order of November 16 and ultimately resulted in agreements with all unions except defendant BofRT. Plaintiffs allege BofRT has insisted that they make agreements providing for operations different from the provisions in the Commission-approved contracts, especially the Primary Agreement and Joint Yard Agreement. Railroads say they are willing to make an agreement with BofRT effectuating Commission's Order. Under the Railway Labor Act it was necessary to seek mediation after above negotiations failed to produce accord. Such mediation continued until May 8 and May 31, 1961. After the expiration of the 30-days-statutory period following mediation, BofRT's General Committee served notice of a strike.[1]

The parties argue as follows. BofRT says the Norris-LaGuardia Anti-Injunction Act (29 U.S.C.A. Secs. 101-110, 113-115) bars an injunction in these circumstances. 29 U.S.C.A. Sec. 101 provides:

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[1] At hearing such testimony was given by plaintiffs' officers relative to crippling consequences of threatened strike upon Texas' economy and railroads' revenues. It was shown that average daily loss of revenues of MoPAC's Gulf District would be $14,358, TEX-MEX $9,284, and T&NO $550,000. All but 500 of T&NO's 10,708 employees would be idled by strike and all but 150 of 4528 employees in Gulf District of MoPAC. On MoPAC alone a monthly payroll of over $2,000,000 would be lost. Finally, Gulf District of MoPAC served 1,614 separate industries in 1960. Disruption of MoPAC and T&NO service would seriously inconvenience major industry on the Texas Gulf Coast.

> "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

29 U.S.C.A. Sec. 107 provides the terms upon which exceptions are made to Sec. 101, supra. Plaintiffs make no attempt to comply with Sec. 107, for there is no pleading that unlawful acts have been committed or will be committed unless restrained, or that public officers charged with the duty of protecting railroad property are unwilling or unable to furnish adequate protection.

Further, BofRT claims plaintiffs failed to comply with 45 U.S.C.A. Secs. 155(1)(b) and 156 in that forbidden changes in working rules and conditions were instituted by railroads during the mediation period. By virtue of these illegal changes BofRT contends plaintiffs run afoul of yet another section of Norris-LaGuardia, i.e., 29 U.S.C.A. Sec. 108:

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Plaintiffs acknowledge their want of compliance with the Norris-LaGuardia Act's dictates of 29 U.S.C.A. Sec. 107. They urge the court to break new ground by judicially engrafting upon Norris-LaGuardia an additional exception. Plaintiffs declare "illegal" any strike to prevent their com-

plying with contracts approved by the Interstate Commerce Commission under Section 5(2) of the Act (49 U.S.C.A. Sec. 5(2)). The court is asked to enjoin such strike despite Norris-LaGuardia's ban.

Plaintiffs observe that by Section 5(11) of the Act (49 U.S.C.A. Sec. 5(11)) the Commission's authority is "exclusive and plenary". BofRT, say plaintiffs, has no veto upon Commission action. Plaintiffs are empowered to carry out their Commission-approved contracts free of the restraints of federal laws (49 U.S.C.A. Sec. 5(11)).[2] 49 U.S.C.A. Sec. 5(11) is thought by plaintiffs to free them from the restrictions of Norris-LaGuardia in their endeavor to abide by the Commission's order of November 16, 1960. Railroads contend that Section 16(12) of the Act authorizes this court to enjoin a strike of rail employees called to prevent compliance with a Commission order.[3]

Plaintiffs cite a number of cases in which judicially-created exceptions have been carved out of the broad domain

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[2] U.S.C.A. Sec. 5(11):

"The authority conferred by this section (upon the Commission) shall be exclusive and plenary, and any carrier . . . participating in . . . any transaction, approved by the Commission . . . shall have full power . . . to carry such transaction into effect . . . and any carriers are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . ."

[3] 49 U.S.C.A. Sec. 16(12):

"If any carrier fails or neglects to obey any order of the commission other than for the payment of money . . . the Inter-State Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process . . . to restrain such carrier . . . from further disobedience . . ."

of Norris-LaGuardia. In the main these authorities constitute reconciliations of Norris-LaGuardia with specific later labor legislation. Thus, Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. 353 U.S. 30 (1956), finds Norris-LaGuardia no bar to injunctive relief when there exists a "minor dispute" referable to the Railroad Adjustment Board under the terms of the Railway Labor Act. The rationale of this case is that the more general provisions of Norris-LaGuardia must yield to the more specific provisions of the Railway Labor Act with reference to "minor disputes". Similarly, Railroad Trainmen v. Denver & Rio Grande Western RR Co., 185 Fed. Supp. 369 (D. Colo. 1960), aff'd .... Fed. (2d) 10th Cir. 1961), 48 L.R.R.M. 2013 (10th Cir. 1961), enjoins threatened strike by brotherhood to enforce Adjustment Board award in "minor dispute". Again, result in adjustment of Norris-LaGuardia to accommodate the Railway Labor Act. An analogous case of accommodation of Railway Labor Act with Norris-LaGuardia is Brotherhood of Railroad Trainmen v. Howard, 343, U.S. 768 (1952).

Another labor statute, Taft-Hartley Act, is reconciled with Norris-LaGuardia in Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, 282 Fed. (2d) 345 (10th Cir. 1960) This was an action by trucking company to enjoin teamsters violating no-strike clause of their collective bargaining contracts. Section 301 of Taft-Hartley Act (29 U.S.C.A. Sec. 141, et seq.) provides that suits for violation of collective bargaining agreements may be brought in federal district court. Trucking companies contended that an injunction to enforce this no-strike clause is permissible under Section 301. It was decided that the jurisdiction accorded district courts by Section 301 of Taft-Hartley prevails over Norris-LaGuardia.

I come then to the heart of plaintiffs' skillful argument. Pointing to the exceptions created in Brotherhood of Rail-

road Trainmen v. Chicago River & Indiana Railroad Co., supra (reconciling Railway Labor Act and Norris-LaGuardia) and Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, supra (reconciling Taft-Hartly Act and Norris-LaGuardia) this court is asked to emulate those decisions. I am requested by plaintiffs to "reconcile" the Interstate Commerce Act and Norris-LaGuardia. Only by enjoining defendant BofRT, any plaintiffs, can the hegemony reposed in the Commission by 49 U.S.C.A. Sec. 5(11) be preserved from encroachment by BofRT.

The issue raised then is: does the Norris-LaGuardia Act bar injunctive relief against a strike to prevent a railroad's complying with a contract approved by the Interstate Commerce Commission pursuant to 49 U.S.C.A. Sec. 5(2)? I think so.

Any exceptions to Norris-LaGuardia must be justified by the most compelling policy considerations. For cases stating the pervasive and compelling character of the Anti-Injunction Act see Afran Transport Co. v. National Maritime Union, 169 Fed. Supp. 416 (S.D.N.Y., 1958), and A. H. Bull Steamship Co. v. Seafarers' Internat'l Union, 250 Fed. (2d) 326 (2d Cir. 1957).

But, argue plaintiffs, just as exceptions have been created to enforce the Railway Labor Act and Section 301 of the Taft-Hartley Act, so ought this court decree an additional exception to enforce 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12). Section 5(11) of the Act purports to give the Commission "exclusive and plenary" authority, free from various federal and state statutory restraints. I do not agree with plaintiffs' contention that 49 U.S.C.A. Sec. 5(11) removes the bar of Norris-LaGuardia. It declares "*they* are relieved from the operation . . . of all other restraints, limitations, and prohibitions of law" etc. "They" refers to the carriers under Commission mandate; the prohibition of Norris-LaGuardia rests not on the carriers but on the

court. Its restraint on this court's jurisdiction is not lifted by Section 5(11).[4] Nor does the court agree with railroads' claim that Section 16(12) of the Act compels an injunction here. Section 16(12) is inapplicable by its very words, i.e., "If any carrier fails . . . to obey any order of the commission . . . any party injured thereby . . . may apply . . . for the enforcement of such order." I submit Section 16(12) is plainly referable to a dispute between government and carrier against defaulting carrier. Here, plaintiffs do not disobey the Commission, and Section 16(12) does not provide for carriers' relief against their own employees.

Plaintiffs' cases are clearly distinguishable in my view. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra, enforced by injunction the Railway Labor Act's explicit provisions for settling "minor disputes". The threatened strike at bar is a major dispute within the usage of the Railway Labor Act (45 U.S.C.A. Sec. 151 et seq.) Also, as demonstrated supra, the statutes plaintiffs say must be reconciled with Norris-LaGuardia (e.g., 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12)) not only fail to support plaintiffs' claims but are not labor legislation as is the Railway Labor Act. Int'l Brotherhood of Teamsters v. Yellow Trans. Frgt. Lines, supra, reconciles the grant of jurisdiction in Section 301 of Taft-Hartley with the restriction of jurisdiction in Norris-LaGuardia. Section 301 involves collective bargaining contracts, while 49 U.S.C.A. Secs. 5(11) and 16(12) concern Commission orders, not management-labor conflict. The point is simply that the exceptions heretofore engrafted judicially upon Norris-LaGuardia aimed at accommodation of apparently conflicting provisions in two different *labor* statutes. Plaintiffs

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[4] United States v. Railway Exp. Agency, 101 Fed. Supp. 1008 (D. Del.) (1951) merely carries out the clear mandate of 49 U.S.C.A. Sec. 5(11) to the effect that carriers' agreements approved by Commission are freed from antitrust laws.

seek to weaken Norris-LaGuardia to enforce non-labor legislation, i.e., the Interstate Commerce Act.[5]

It is clear that illegality under non-labor legislation (e.g., 49 U.S.C.A. Secs. 5(2), 5(11) and 16(12)) does not remove the bar of Norris-LaGuardia upon federal injunctive power. A case closely in point factually in Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 (1960). Railroad and union were arguing over displacement of railroad employees by consolidation of stations in villages and hamlets whose traffic warranted closing. Just as plaintiffs have sought Commission sanction upon Corpus Christi consolidation, so did railroad seek approval of station consolidation by state regulatory groups in Telegraphers case. The Telegraphers threatened strike over consolidation just as does BofRT. The Supreme Court, in denying the carrier's request for injunction, said in 362 U.S. at 338-340:

> "The railroad has argued throughout the proceedings that the union's strike here may be enjoined, regardless of Norris-LaGuardia, because its effort to bargain about the consolidation and abandonment of railroad stations (compare plaintiffs' argument at bar about Corpus Christi yard consolidation) is unlawful. It is true that in a series of cases where collective bargaining agents stepped outside their legal duties . . . we held that they

[5] Baltimore & Ohio R.R. Co. v. Chicago River & Indiana R.R. Co., 170 Fed. (2d) 654 (7th Cir. 1948), comes nearest to supporting plaintiffs. One railroad sued under 49 U.S.C.A. Sec. 16(12) to enforce a Commission order against a second railroad. The injunction granted to enforce the order ran also against defendant carrier's employees. Since the dispute over the Commission order was between two railroads, it was not a "labor dispute" between employer and employers within Norris-LaGuardia. The situation at bar differs in three respects: (1) our dispute is railroads v. employees and union, not railroad v. railroad; (2) enforcement of Commission order is sought solely against union, not merely incidentally to primary enforcement against carrier; (3) Section 16(12) of Act clearly supports carrier v. carrier enforcement; and (4) Section 16(12) by its wording does not provide for railroads v. union suit.

could be enjoined. None of these cases, however, enjoined conduct which the Norris-LaGuardia Act withdrew from the injunctive power of the federal courts except the Chicago River case which held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act. . . . The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunction is not lifted because the conduct of the union is unlawful under some other, nonlabor statute. *Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' . . . There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.*" (Emphasis supplied.)

Lee Way Motor Freight v. Keystone Freight Lines, 126 Fed. (2d) 931 (10th Cir. 1942), rejects claims, similar to plaintiffs' as to efficacy of 49 U.S.C.A. Sec. 16(12) in a "labor dispute" between carrier and employees' union. An attempt similar to plaintiffs to evade Norris-LaGuardia by reference to the Interstate Commerce Act's plenary authority was thwarted by the Fifth Circuit in East Texas Motor Fr. L. v. International Brotherhood, etc., 163 Fed. (2d) 10, 12 (5th Cir. 1947).

In summary the case at bar represents the classic "labor dispute" clearly within the purview of Norris-LaGuardia. Plaintiffs' argument urging creation of an added exception, facile and well-presented though it be, does violence to the national policy enunciated by the Norris-LaGuardia Act. Mr. Justice Black's closing words in Telegraphers at 362 U.S. 342, are apt:

"It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent . . . Railroad and to the absolute necessity for the abandonment of railroad stations. *These arguments, however, are addressed to the wrong forum.* If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent 'waste' by the railroads, *Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it.*" (Emphasis supplied)

Plaintiffs' request for injunctive relief will be denied. The clerk will notify counsel to draft and submit appropriate order.

APPENDIX C

STATUTES INVOLVED

Interstate Commerce Act, as amended:

National Transportation Policy (54 Stat. 899, 49 U.S.C., preceding Sec (1):

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices, to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this act (chapters 1, 8, 12, 13 and 19 of this title), shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 5(2)(a)(ii), 54 Stat. 905, 49 U.S.C., Sec. 5(2)(b):

> "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, that if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Sec. 5(2)(c), 54 Stat. 906, 49 U.S.C. Sec. 5(2)(c):

"In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following consideration, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public. (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

Sec. 5(2)(f), 54 Stat. 906, 49 U.S.C. Sec. 5(2)(f):

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Sec. 5(11), 54 Stat. 908, 49 U.S.C., Sec. 5(11):

"The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation

participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State."

Sec. 16(6), 36 Stat. 554, 49 U.S.C., Sec. 16(6):

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

Sec. 16(7), 41 Stat. 492, 49 U.S.C., Sec. 16(7):

"It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect."

Sec. 17(11), 54 Stat. 916, 49 U.S.C., Sec. 17(11):

"Representatives of employees of a carrier duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

Railway Labor Act, as amended, 48 Stat. 1191, 45 U.S.C. Section 153 (i), (j), (k), and (l):

"(i) The disputes between an employee or group of employees and the carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as

to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof, and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees."

Sec. 156:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without re-

quest for or proffer of the services of the Mediation Board."

Norris-LaGuardia Act:

Sec. 101, 47 Stat. 70, 29 U.S.C., Sec. 101:

"No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter."

Sec. 104, 47 Stat. 70, 29 U.S.C. Sec. 104:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined), from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Sec. 108, 47 Stat. 72, 29 U.S.C., Sec. 108:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

APPENDIX D

HISTORY OF SECTION 5(2)(f)

As stated in *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, at pages 146-47:

> "Before the Transportation Act of 1940 brought Sec. 5(2)(f) into the Interstate Commerce Act, there was no statutory provision specifically requiring the protection of employees affected by consolidations of railroad facilities. The precursor of this provision was Sec. 5(4)(b), as amended by the Emergency Railroad Transportation Act of 1933. That section authorized the Commission to approve consolidations 'upon the terms and conditions . . . found to be just and reasonable.' There was, however, a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor."

Early in 1936, Joseph B. Eastman, Coordinator of Railroads, proposed to issue orders under the Emergency Transportation Act of 1933, compelling unification of terminals in twelve different places. That proposal created a great deal of concern on the part of railroad employees, and on March 6, 1936, President Roosevelt sent a joint letter to Mr. Pelley, representing the Association of American Railroads, and Mr. Phillips, representing the Association of Railway Labor Executives, asking that railroad management and railroad labor attempt to work out a mutually satisfactory agreement for the protection of labor affected by consolidations and coordinations. In the course of the letter, President Roosevelt said:

> "A critical situation prompts this letter. It is common knowledge that there is much waste in railroad operation caused by the great number of railroad companies,

and that much of it can be avoided either by consolidations or by greater cooperation and coordinated use of various facilities. This waste hampers railroad progress and is a burden on the rate-paying public. It ought to be eliminated for the good of all concerned . . .

"In the long run, the employees will surely gain from maximum efficiency and economy in railroad operation. With competitive conditions what they now are, and promise to become, this is the only path to the increased traffic and revenues which the railroad future will require. But sudden steps in this direction may cause temporary hardships. The employees are fairly entitled to protection against such hardship."[1]

As a result of the President's request, negotiations were undertaken which resulted in an agreement in May, 1936, known as the Washington Agreement. It was signed by all of the railway labor organizations and by representatives of railroads operating about 85% of the railroad mileage in the United States. This agreement gave employees specified protection against the adverse effects of consolidations and coordinations.[2] All of the railroads involved herein were parties to the Washington Agreement, and the agreement is still in effect.

In 1938, the President appointed a Committee of Six, consisting of three railroad and three labor representatives, to reconcile management-labor differences incident to a legislative program which ultimately resulted in the Transportation Act of 1940.[3] That Committee agreed on a proposal that the Interstate Commerce Commission (it was first

[1] Testimony of Joseph B. Eastman, Hearings of the House Committee on Interstate and Foreign Commerce, HR 2531, 76th Cong., 1st Sess. 1720-23 (hereinafter referred to as House Hearings (1939)).

[2] The agreement is published at pages 231-41, House Hearings (1939).

[3] 86 Cong. Rec. 5880.

proposed that these matters be handled by a separate Transportation Board), before approving a consolidation of rail lines, should require that fair and equitable arrangements be made for the protection of the employees who might be affected adversely thereby. This proposal was incorporated in bills presented in both the House and Senate. George M. Harrison, a labor representative on the Committee of Six, while testifying before the House Committee, said:

> "Well, you might very properly ask the question, If we have [the Washington] agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made."[4]

Mr. Harrison went further to explain the position of labor in seeking, along with government and management, a solution to the problems of the railroads.

> "Now, in regard to financial reorganization; I think it is inevitable that people who have their money in the industry have got to make a sacrifice, because the industry just won't support the volume of debt now existing. It just cannot earn the money out of the available business and with competition as it exists today and will exist in the future.
>
> "I doubt that many of the properties would ever be able to support the present volume of debt.

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[4] House Hearings (1939) 216-17. See also statement of Representative Lea, 86 Cong. Rec. 5864.

"Now, I do not understand that the investor is adverse to making a reasonable contribution that will come about as the result of these financial reorganizations.

"Labor has indicated its willingness to cooperate by saying that where it can be shown to be in the public interest, mergers ought to be effected and then we are making a sacrifice to the extent of a portion of our wages, because, under the collective agreement of May 1936, we only get 60 percent of compensation for men who are furloughed or deprived of employment.

"So we would be giving 40 percent of our wages."[5]

The position of the Trainmen was contrary to that of all the other Brotherhoods. Mr. McGrath, the Trainmen's General Counsel, testified strongly against the consolidation and merger proposals. In the course of his remarks, he stated:

"While the Brotherhood of Railroad Trainmen reluctantly subscribe to the so-called Washington or dismissal wage agreement, we have never felt that it does justice to the men who may be displaced by reason of railroad unifications. Even that agreement was made in the light of the fact that the law provided a means by which it has been impossible to bring about the deprivation of employment for railroad men on any drastic scale. An acceptance by railroad labor of the provisions concerning the unifications which are now proposed cannot but be construed as a tacit agreement on the part of railroad employees that mergers, consolidations, co-ordinations, and so forth, may be freely made, so long as the interests of labor are 'considered' and some sort of supposed protection given to their interests. If the bill is passed with Section 49 as it now reads, it will be interpreted as an invitation to the railroads to accelerate their consolidations plans, and by the Commission or Board to do the same with regard to the approval of such plans. If such a course is pursued we

[5] House Hearings (1939) 217-18.

cannot but look forward to a wholesale destruction of railroad jobs without adequate compensation to the employees for the loss.[6]

The testimony of Mr. McGrath contrasts sharply with that of Mr. Harrison, both before the House Committee and the Senate Committee. In the latter testimony Mr. Harrison had the following exchange with Senator Reed:

> "*Senator Reed:* Having run into your Brotherhoods at different times in my career, I think I understand their approach, which again is an approach of maintaining employment as stable as possible; but if in the working out of this problem it became necessary or desirable to have unification and if the men who were displaced by unification or consolidation were taken care of by a reasonable adjustment, such as you now have with the management, would that not largely take care of the labor situation?
>
> *Mr. Harrison:* I think in the main, Senator —
>
> *Senator Reed:* Thank you very much.
>
> *Mr. Harrison:* (continuing)—that it protects labor.
>
> *Senator Reed:* Thank you, very much. We all want to protect labor. There is no unfriendliness among us. I am one, if you please, who believes that there is no answer to this railroad problem except consolidation or, prior to consolidation, a very substantial unification of facilities, so as to reduce the operating expenses and the cost of service down to a point where the railroads can sell more service."[7]

After the Committee hearings, the recommendation of the Committee of Six was subjected to close scrutiny, rigorous debate, and traveled a rough road, particularly in the House, before present Section 5(2)(f) of the Act was adopted.

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[6] House Hearings (1939) 1292.

[7] Hearings on S. 2009 before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess. 38.

At some stage of the Congressional hearings, the Trainmen disagreed with the recommendation of the Committee of Six so far as consolidations and coordinations were concerned. Consequently, at the instigation of the Trainmen, in the House, Representative Harrington offered an amendment to the bill under discussion incident to railroad consolidations and coordinations so that the provisions pertaining to employee protection would be (the italicized language being the amendment proposed by Representative Harrington) as follows:

> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interest of the employees affected, *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*"[8]

The proposed amendment was debated at some length and during the course of the debate it was clear that the Trainmen were the real sponsors. Proponents of the amendment quoted Daniel Willard, President of the B&O Railroad, to the effect that:

> "Eighty percent of the savings effected by consolidations would be taken out of the pockets of the railroad workers,"[9]

and they insisted that the employees were entitled to more protection than merely leaving to the discretion of the Commission imposition of conditions that were fair and equitable. Representative Harrington concluded his remarks with the following statement:

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[8] 84 Cong. Rec. 9882.

[9] 84 Cong. Rec. 9883.

> "Fellow Members, in addition to all its other inequities against the public, this legislative monstrosity will throw thousands of railroad employees out of work. Let us sidetrack the bill now until the next session. In the meantime I feel safe in assuring you that the railroad brotherhoods will wake up to the fact that they are the victims of a 'sellout.' An educational plan is under way to undeceive them as to the so-called merits of this bill. The 'Paul Reveres' are beginning to ride. The country is just getting wise."[10]

Representative Lea, joined by Representative Rayburn, spearheaded the effort to defeat the Harrington amendment. Among other things Representative Lea pointed out that twenty of the twenty-one Railroad Brotherhoods were supporting the bill, without amendment; that railroad jobs could best be preserved by eliminating surplus railroad facilities and operations; and that the amendment would prevent any consolidations or coordinations which had any adverse effect on railway labor. The amendment was adopted by the House.[11]

The following is quoted from *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142, at pages 151-53:

> "With the Harrington Amendment in it, the bill went to conference. It came out with all provisions relating to consolidations under Sec. 5 eliminated. The House, however, recommitted the bill to conference with instructions to insert a modified form of the first sentence of Sec. 5(2)(f), together with a modified form of the Harrington Amendment . . . .
>
> "The second conference reported Sec. 5(2)(f) in the final form in which it was enacted into law. It retained the first sentence in its original language. In the second sentence, however, it included a substantial change in

[10] *Ibid.*

[11] 84 Cong. Rec. 9887.

the Harrington proposal. It limited it to the four years following the effective date of the Commission's order of approval. It provided also that in each case the protective period was not to exceed the length of each employee's employment by a carrier prior to the effective date of the Commission's order of approval. . . ."

Two statements made during the final debate in the House on the Transportation Act of 1940 serve to sum up the history and intent of Section 5(2)(f). The first is by Representative Lea:

"The next amendment concerning which the House instructed us was known as the Harrington amendment. There were certain things involved in the instructions as to this amendment to which I want to call your attention. The first was that the Interstate Commerce Commission should make fair and equitable provisions for employees affected adversely by reason of consolidations or unifications. We had a provision in the original bill that came to the House to that effect and the amendment that we have agreed upon embodies that same provision.

"Another provision was that where there is a substitution of transportation, for instance, by truck instead of rail, the employees of the abandoned line should have under those circumstances an order of the Commission fairly protecting their rights against unemployment. That is the only provision that is eliminated in this conference report.

"There was a further provision — the instruction as to the Harrington amendment — that the agreement should include conditions so that the transaction will not result in employees being placed in a worse condition with respect to their employment. That provision is written in the conference agreement.

"Then there was a provision confirming the right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations.

"The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation: In other words, the employees have the protection against unemployment for 4 years, but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.

"There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.

"We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement. We simply write specific provisions that shall be in the order of approval of the Commission, but otherwise we do not tie its hands."[12]

The second statement was made by Representative Wolverton:

"[I]t was recognized that the real intent of the sponsors [of the original proposals] was to save the railroad employees from being suddenly thrust out of

[12] 86 Cong. Rec. 10178.

employment as the result of any consolidation or merger entered into. . . . In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining.

"The conferees have struggled long and hard to agree upon language that would be mutually satisfactory to all the Senate conferees, the brotherhoods, and the railroads. We believe the language now proposed as a compromise is a fair and just solution. We also understand that it is acceptable to all who are to be effected by the provision. I sincerely hope that it will have the approval of the House as I do not believe anything further can be done if this fails to be acceptable. If this should fail then I am fearful that it would not be possible to obtain any legislation on the subject. I do not believe that any one who is truly interested in the welfare of the employees, or in helping the plight of the distressed railroad industry would want such a result. Nor should anyone overlook the fact that the adoption of this amendment as agreed to by the conferees gives railroad workers protection against sudden dismissal and financial assistance that is not enjoyed by workers in any other industry. And, this is true without any exception or qualification whatsoever."[13]

[13] 86 Cong. Rec. 10189.

APPENDIX E

HISTORY OF SECTION 5(11)

Section 5(11) of the Interstate Commerce Act was enacted in its present form as part of the Transportation Act of 1940, 54 Stat. 899, 908. The earliest predecessor of the present Section 5(11) was enacted as part of the Transportation Act of 1920, 41 Stat. 456, 482, and was codified as Section 5(8) of the Interstate Commerce Act. The Transportation Act of 1920 preceded the original enactment of the Railway Labor Act in 1926, and the Norris-LaGuardia Act in 1932. Hence in 1920 there was no occasion to decide which act might take precedence over the other.

Section 5(8) of the 1920 Act was reenacted in substantially the same form as part of Title II, Section 202, of the Emergency Railroad Transportation Act, 1933, 48 Stat. 211, 219. Codified as Section 5(15) of the Interstate Commerce Act, this immediate precedessor to the present Section 5(11) provided:

> "(15) . The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order."

To understand the significance of this section, reference should be made to the structure and general purpose of the entire Emergency Railroad Transportation Act, 1933. This Act consisted of two separate Titles — Title II consisting wholly of amendments to the existing Interstate Commerce Act (48 Stat. 217-221). Title I, in distinction,

created the position of Federal Coordinator of Transportation and vested him with various temporary emergency powers intended to promote railroad economies, including those resulting primarily from coordinations falling short of Section 5 unifications (48 Stat. 211-217).

Section 10 of Title I had the same general purpose as Section 202 of Title II, but contained important additional provisions as is readily apparent:

> "Sec. 10(a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant *to this title*, shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through the contracts entered into in accordance with the provisions of said Act.*
>
> "(b) The Coordinator shall issue no order which shall have the effect of relieving any carrier or subsidiary from the operation of the law of any State or of any order of any State commission until he has advised the State commission of said State, or the Governor of said State if there be no such commission, that such order is in contemplation, and shall afford the State commission or Governor so notified reasonable opportunity to present views and information bearing upon such contemplated order, nor unless such

> order is necessary, in his opinion, to prevent or remove an obstruction to or a burden upon interstate commerce." (Emphasis supplied.)

Thus, the broad relief against the operation of Federal and State laws granted in Title II under Section 5(15) was, as to Title I orders, rendered inapplicable to the Railway Labor Act and to duties and obligations imposed by contracts entered into under the provisions of that Act.

The legislative history of Title I, Section 10 indicates an obvious Congressional awareness of the effect of this distinction between these provisions of Titles I and II, both forming part of the same 1933 Act.

The 1933 Act was before both Houses of Congress as S.1580. As originally reported to the Senate by the Committee on Interstate Commerce, S.1580 included Title I, Section 10, in essentially the form of final enactment. The hearings held before the Senate Committee prior to the issuance of its report include pointed references to the provisions of Section 10. Commissioner Eastman in his testimony referred specifically to Section 10 and to the proviso regarding the Railway Labor Act.[1] Mr. Donald Richberg, counsel for Railway Labor Executives' Association, was even more detailed in his reference to the Railway Labor Act and collective bargaining agreements. He proposed an amendment which would have added the following to Title I, Section 7:

> "No bulletin, notice, order or other method of changing contractual requirements or the established interpretation or application of an existing contract between a carrier and its employees or fixing wages and working conditions without an agreement between a carrier and its employees, shall be effective unless made after compliance with the requirements of the Railway

[1] Hearings on S.1580 before the Senate Committee on Interstate Commerce, 73rd Cong., 1st Sess. 31.

Labor Act and particularly as set forth in Sections 2 and 6 thereof."[2]

Thereafter, there occurred the following colloquy, relating to the effect of this proposal:

> "*Senator Couzens.* I mean if the Coordinator wants to do anything that is any way touching the contractual relations between the railroads and the employees, it could not be done until the employees and the railroads agreed?
>
> *Mr. Richberg.* Or tried to reach an agreement. That is correct.
>
> *Senator Couzens.* Yes.
>
> *Mr. Richberg.* That is, as a matter of fact, supposed to be retained in the present draft of the bill, which provides that —
>
> 'Nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.'
>
> We have seen so much of the evasion of that act. We think it ought to be written out a little more clearly."[3]

It is most significant that despite his obvious familiarity with S.1580, Mr. Richberg did not question the failure of the proposed Section 5(15) to exclude from the scope of its operation the Railway Labor Act and contracts entered into thereunder. Nor was any reference to this significant difference challenged elsewhere in the hearings by spokesmen for railroad labor.

The emergency powers conferred on the Coordinator under Title I were a subject of substantial debate when

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[2] Id. at 101.

[3] *Ibid.*

S.1580 was being considered. This debate related primarily to state laws and demonstrated clearly why no concern was expressed over the difference between Title I, Section 10 and Title II, Section 202, so far as the Railway Labor Act is concerned.

During the Senate debate on May 27, 1933, continuing concern was expressed about the power of a single Co-ordinator to relieve against the operation of state laws. The power of one man to do so, as provided in Title I, was compared unfavorably with the power of the full Commission to do so as provided in Title II.[4] In the course of these discussions on May 27, at the request of Senator Norris, Title I, Section 17, was amended by the addition of the following clause:

> ". . . but notwithstanding the provisions of section 10 no such order shall operate to relieve any carrier from the effect of any State law or of any order of a State commission enacted or made after this title ceases to have effect."[5]

Senator Connally also succeeded in having Title I amended by the addition of the following provisions, forming Title I, Section 11, of the Act as finally passed:

> "Sec. 11. Nothing in this title shall be construed to relieve any carrier from any contractual obligation which it may have assumed, prior to the enactment of this act, with regard to the location or maintenance of offices, shops, or roundhouses at any point."[6]

Concern over the impact of Federal orders on state laws and contracts was expressed only in connection with the emergency powers of the Coordinator under Title I of the

[4] 77 Cong. Rec. 4433-39.
[5] 77 Cong. Rec. 4438.
[6] 77 Cong. Rec. 4439.

1933 Act. No one suggested that similar limitations should be imposed on Commission orders entered under Section 5 of the Act. Commission regulation was not feared; one man rule was.

The Senate's awareness of the differences in the provisions in Title I and Title II appears in the following colloquy between Senator Vandenberg and Senator Dill, the bill's sponsor, with reference to Title I, Section 10:

> "*Mr. Vandenberg.* Does the proposal undertake at any point to permit the Coordinator to suspend the operation of state laws?
>
> *Mr. Dill.* Yes; the bill contains in Section 10, language that is at present in the Interstate Commerce Act. The law of 1920 authorized the Interstate Commerce Commission to suspend Federal and State laws, if it was found in the public interest to do so, in the consolidations that were authorized. The pending bill carries practically the same language, except that it has the reservation of protection to the public health and the public safety, and of the Railway Labor Act, which the interstate commerce law today *does not have*. They cannot be suspended under the provisions of this bill."[7]

Before passing the Transportation Act of 1940, which included Section 5(11) in its present form, Congress had before it a proposal to limit Commission orders under Section 5 so that they would not suspend the requirements of the Railway Labor Act and contracts entered into under the same. Title II, Section 209 of H.R. 2531 (76th Cong., 1st Sess.) provided:

> "The carriers affected by an order of the Commission made pursuant to this Act shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the anti-trust laws, as designated in

[7] 77 Cong. Rec. 4254. (Emphasis supplied.)

section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions of law, State of Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them to do anything authorized or required by such order made pursuant to this Act. *Nothing herein shall be construed to repeal, amend, suspend or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act:* The Commission shall issue no order which shall have the effect of relieving any carrier from the operation of the law of any State or the order of any State authority, unless it shall have given the Governor of such State prior notice of the proceeding and an opportunity to be heard." (Emphasis supplied.)

In enacting Section 5(11) Congress chose to ignore the restrictions which had been proposed in H.R. 2531. In fact Congress chose to broaden the language of the previous acts, as appears from the final form of Section 5(11), which includes the key introductory phrase, "The authority conferred by this section shall be exclusive and plenary . . .," and omits any mention of previously proposed restraints.